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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO MARQUEZ AGUILAR, Defendant and Appellant.	D073698 (Super. Ct. No. SCD246898)

APPEAL from a postjudgment order of the Superior Court of San Diego County, Eugenia A. Eyherabide, Judge. Affirmed.

Charles R. Khoury Jr. for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos, Seth M. Friedman, and Nora S. Weyl, Deputy Attorneys General, for Plaintiff and Respondent.

Facing removal proceedings following his release from custody after a guilty plea, Antonio Marquez Aguilar filed a motion to vacate his sex offense conviction on two

grounds. He argued security footage of the sexual encounter and evidence impeaching the victim amounted to "[n]ewly discovered evidence of actual innocence" requiring that the conviction be vacated. (Pen. Code, § 1473.7, subd. (a)(2).)[1] He further argued he did not "meaningfully understand" adverse immigration consequences of a guilty plea because plea counsel misinformed him that the video would guarantee his conviction. (§ 1473.7, subd. (a)(1).) The court denied his motion.

On appeal, Aguilar contends he is entitled to vacate his convictions on grounds of newly discovered evidence of actual innocence. He no longer claims he did not understand the immigration consequences of a guilty plea. As we explain, although Aguilar may not have appreciated the supposed strength of his case in pleading guilty, the evidence he proffers is neither newly discovered nor demonstrative of his actual innocence. Accordingly, we affirm the order denying his motion to vacate.

FACTUAL AND PROCEDURAL BACKGROUND

During a 2013 New Year's party in a downtown San Diego bar, Cariann B. tripped and fell as she walked toward the bathroom. She was helped into a chair by another woman and Aguilar, who stood nearby. The second woman left to find Cariann's boyfriend and returned a few minutes later. In that interval, Aguilar penetrated Cariann's vagina with his fingers several times.[2]

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1 Further statutory references are to the Penal Code.

2 We draw these facts from the probation report solely for context. (See *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 5.)

In March 2013, the San Diego County District Attorney charged Aguilar with forcible sexual penetration (§ 289, subd. (a)(1)(A), count 1) and sexual penetration of an intoxicated person (§ 289, subd. (e), count 2). Retained defense counsel stipulated to a bindover, and the complaint was deemed the information.

In December, Aguilar pleaded guilty to a lesser included offense (LIO) of count 1 and accepted a two- to four-year prison term. As to the factual basis, Aguilar admitted he "touched the intimate part of another for sexual gratification while that person was unconscious." The plea form stated Aguilar would be convicted under section 243.6, subdivision (c), which turned out to be an unrelated statute pertaining to battery of a school employee. Advising Aguilar of the immigration consequences during the plea colloquy, the court struck the word "may" from the plea form and replaced it with "will" to indicate that if Aguilar was not a United States Citizen, "this plea of guilty *will* result in your removal, deportation, exclusion from admission to the United States and a denial of naturalization." (Italics added.) The court dismissed count 2 and accepted the guilty plea.

Before sentencing, the probation department confirmed with the district attorney's office that the plea form should have indicated a conviction for sexual battery under section 243.4, subdivision (c), not section 243.6, subdivision (c).[3] No changes were made at sentencing, however, and Aguilar received a four-year upper term in January

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[3] As we will explain, section 243.4, subdivision (c) (sexual battery of a victim "unconscious of the nature of the act" given perpetrator's fraudulent representation) is *also* the wrong statute.

2014. The abstract of judgment indicated he was convicted under section 243.6, subdivision (c) for the "touching of [an] unconscious person."

In March 2014, the Department of Corrections and Rehabilitation sent a letter identifying a discrepancy between the abstract and the probation report. The letter noted that the maximum sentence for battery of a school employee was three years, whereas the maximum for sexual battery was four. A year later, the court amended its sentencing minutes nunc pro tunc to the original sentencing date "to reflect the correct violation of PC 243.4[, subdivision](c)." An amended abstract of judgment indicated Aguilar had been convicted under section 243.4, subdivision (c) for the "touching of [an] unconscious person."

Around this time, Aguilar was defending a civil lawsuit filed by Cariann. His civil defense counsel told him that after reviewing the security footage of the incident, he believed it showed Aguilar's innocence and the ineffectiveness of prior criminal counsel.

Aguilar filed a petition for writ of habeas corpus in the superior court in December 2015, citing newly discovered impeachment evidence concerning Cariann. The court denied the petition, noting the impeachment evidence did not prove his actual innocence. It also observed that Aguilar had not requested habeas relief on the ground the nunc pro tunc correction was done without notice and outside his presence. Following Aguilar's release from custody in January 2016, this court summarily denied his petition for writ relief. In March 2016, he was placed in deportation proceedings.

Nearly two years passed. In January 2018, Aguilar filed a motion to vacate his conviction under section 1473.7. He submitted the video of the incident and a police

report stating the officer who reviewed the video "was unable to tell if [Cariann] was attempting to dissuade [Aguilar]." He also submitted out-of-state impeachment evidence concerning Cariann, including Colorado and Utah arrest records and a Utah police file closing an investigation into her alleged rape.

As he does on appeal, Aguilar argued the video demonstrated his actual innocence because it showed Cariann was neither unconscious nor nonconsenting during the sexual encounter. He claimed it was newly discovered because his criminal defense counsel's deficient performance prevented it from being shown to Aguilar or to a judge at a preliminary hearing. He also claimed the evidence impeaching Cariann was newly discovered because an appropriate investigation by counsel would have produced this evidence and bolstered Aguilar's prospects of success at trial. In effect, Aguilar claimed his counsel's errors left him unaware of the strength of his case and unable to meaningfully understand the immigration consequences of his guilty plea. Apart from these claims, Aguilar argued the amendment of the conviction nunc pro tunc in April 2015 violated his statutory and constitutional rights.

Aguilar supported his motion with four declarations. His immigration attorney explained that Aguilar faced imminent deportation and would benefit from an order vacating his conviction. Aguilar's civil defense counsel explained he told Aguilar in early 2015 to try to withdraw the plea based on the video. His plea counsel filed a separate declaration, expressing his view that the video and witness accounts within police investigative reports would result in a jury conviction. He further explained, "In my discussion with [Aguilar] about his decision to plead guilty I informed him of my

belief that he would be deported and barred from reentry into the United States." Aguilar declared that his plea counsel had told him the video was "so incriminatory," and pleading guilty would result in a maximum four-year sentence with "a chance they would not deport [him]."

The court heard argument on Aguilar's motion. Pronouncing its ruling, the court rejected his challenge to the nunc pro tunc correction. The admitted factual basis of the plea demonstrated a clear clerical error—touching the intimate part of another for sexual gratification while that person was unconscious had nothing to do with the battery of a school employee under section 243.6—and sexual battery under section 243.4 was the correct lesser offense to the charged crimes. Because he had been sentenced under the two-three-four year scheme found under section 243.4, the court believed the April 2015 nunc pro tunc correction merely remedied a clerical error and did not require the presence of Aguilar or his attorney.[4]

Next, the court rejected Aguilar's argument that he did not meaningfully understand the immigration consequences of a guilty plea. (§ 1473.7, subd. (a)(1).) Aguilar conceded knowing it was *possible* he could face removal, satisfying defense counsel's obligation. Moreover, the court noted it had specifically replaced the word "may" to "will" to ensure Aguilar understood that deportation was an unavoidable consequence of his plea.

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4 The court went on to explain that the nunc pro tunc correction did not provide a basis to vacate the conviction under section 1473.7, subdivision (a). It neither related to Aguilar's understanding of the immigration consequences of a guilty plea nor constituted newly discovered evidence of his actual innocence.

Finally, the court concluded the security video of the incident was not "newly discovered evidence." Although section 1473.7 did not define that term, it looked to section 1473.6, which allows a defendant to move to vacate a judgment based on newly discovered evidence of government fraud or misconduct. That statute defines " 'newly discovered evidence' " as "evidence that could not have been discovered with reasonable diligence prior to judgment." (§ 1473.6, subd. (b).) In addition, Aguilar was aware of the video when he entered his guilty plea in 2013 and its purported exculpatory nature in 2015 and thus could not show that he had sought relief on this basis "without undue delay." (§ 1473.7, subd. (c).)

Finding Aguilar had not met his burden of proof, the court denied his motion to vacate his conviction.

DISCUSSION

Section 1473.7 allows a person who is no longer in criminal custody to file a motion to vacate a conviction on one of two grounds.[5] The first applies where there was error damaging the defendant's ability to meaningfully understand the potential adverse immigration consequences of a guilty or no contest plea. (§ 1473.7, subd. (a)(1).) The second applies where "[n]ewly discovered evidence of actual innocence exists that

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[5] Section 1473.7 went into effect on January 1, 2017. (Stats. 2016, ch. 739, § 1 (Assem. Bill No. 813).) Amendments made effective January 1, 2019, after Aguilar's motion, clarify certain procedures for the motion and hearing. (Stats. 2018, ch. 825, § 2.) The new statute applies retroactively. (See *People v. Perez* (2018) 19 Cal.App.5th 818, 828 [applying former section 1473.7 retroactively]; *People v. Camacho* (2019) 32 Cal.App.5th 998, 1005 [new statute simply clarified old].) Because any differences between the two are not relevant to this appeal, we refer to the new statute throughout this opinion for clarity.

requires vacation of the conviction or sentence as a matter of law or in the interests of justice." (§ 1473.7, subd. (a)(2).)

Aguilar's opening brief relies heavily on an immigration-consequences case, *Lee v. United States* (2017) __ U.S. __ [137 S.Ct. 1958] (*Lee*). The defendant in *Lee* received erroneous advice that deportation would not follow his guilty plea. On the record, this advisement entitled him to vacate his conviction based on ineffective assistance of counsel; there was prejudice even though his prospects of acquittal at trial were "grim." (*Id.* at pp. 1965, 1968; see generally, *Padilla v. Kentucky* (2010) 559 U.S. 356, 374 [to provide effective assistance, counsel must advise whether plea carries a risk of deportation].) Interpreting this discussion of *Lee* to mean that Aguilar was reasserting his immigration consequences contention on appeal, the People argue at length in their respondent's brief that the plea form and colloquy made it clear that deportation was a certainty.

On reply, Aguilar makes clear that he does *not* contend on appeal that he did not meaningfully understand the immigration consequences of his plea. Instead, his claim is that ineffective assistance of counsel misinformed him of the strength of his case, leading him to *take* the plea and forego trial. In Aguilar's view, he is entitled to relief under section 1473.7, subdivision (a)(2). Accordingly, we focus our inquiry on that prong, ignoring what Aguilar labels a "straw man argument about immigration advisement."

Aguilar argues the video constitutes newly discovered evidence of his actual innocence. As he construes it, Cariann was conscious and consented to the sexual encounter. He claims this evidence, combined with out-of-state impeachment evidence

regarding Cariann, proves he received ineffective assistance in waiving a preliminary hearing and pleading guilty. Since section 1473.7, subdivision (c) requires a motion to vacate on grounds of new evidence to be brought without "undue delay," he maintains he filed the motion as promptly as he could given counsel's performance and purported changes in the law (enactment of section 1473.7 and *Lee*, *supra*, __ U.S. __ [137 S.Ct. 1958]) facilitating his claim. Addressing these contentions in turn, we conclude they lack merit.

1. *Standard of review*

The parties dispute the applicable standard of review. Aguilar urges us to follow cases that review a denial of a section 1473.7 motion de novo. (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76; *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116; *People v. Tapia* (2018) 26 Cal.App.5th 942, 950.) He notes section 1473.7's placement in the chapter dealing with habeas corpus to urge de novo review. By contrast, the People liken the order to a denial of a new trial motion claiming new evidence (§ 1181, subd. (8)) and suggest an abuse of discretion standard applies. (See *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1047 [reviewing denial of new trial motion for abuse of discretion].)

We need not resolve which standard applies. As we explain, Aguilar's claims fail even under de novo review because the evidence he offers is neither "newly discovered" nor probative of his "actual innocence." (§ 1473.7, subd. (a)(2).)

2. *The proffered "new" evidence*

Aguilar proffers two types of "newly discovered" evidence. The first is a 23-minute video depicting the entire incident.[6] The second consists of certain out-of-state evidence impeaching Cariann—her Colorado arrest for a false domestic violence claim (Exh. G), a closed Utah investigation after she reported a rape (Exh. H), and her Utah arrest for domestic violence (Exh. L).[7] Aguilar also argues the court's nunc pro tunc change in the crime to which he was pleading 15 months after sentencing provides a basis to vacate under the statute.

Of these, only the video could conceivably bear on Aguilar's "actual innocence." (§ 1473.7, subd. (a)(2).) Aguilar concedes the out-of-state materials concerning Cariann would be relevant only for "impeachment purposes," not to show his actual innocence of a sexual battery. Although Aguilar may have opted for trial over a guilty plea had he been aware of these materials, that does not transform them into evidence of actual

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6 Exhibit E to Aguilar's motion is a police report by an investigating officer who interviews witnesses and comments on the video. Based on the video, the officer expresses doubt as to whether Cariann was attempting to assist or dissuade Aguilar during the encounter. The opening brief discusses the police report at length in the statement of facts, but it appears that Aguilar rests his *arguments* on the video and the impeachment evidence alone. To the extent the police report is offered as new evidence of actual innocence, the officer's opinion statement contained in the police report is inadmissible hearsay. (See *People v. Johnson* (2016) 1 Cal.App.5th 953, 968, fn. 16; see also *In re Fields* (1990) 51 Cal.3d 1063, 1070, fn. 3 [habeas proceedings may not rest on inadmissible hearsay].)

7 Exhibit K to Aguilar's motion to vacate purports to be a document in which Cariann admits a forgery. Actually, the exhibit in our record appears to be a motion in limine to introduce such evidence in the civil trial. In any event, such evidence would also be categorized as impeachment evidence concerning the victim.

innocence. In addition, the nunc pro tunc correction is not *evidence* of his actual innocence, as the court properly found.[8]

Accordingly, we limit our analysis to whether the 23-minute video is "newly discovered" and evidence of "actual innocence" requiring us to vacate Aguilar's conviction.

3. *The security video is not "newly discovered"*

Section 1473.7 does not define the term, "newly discovered evidence." It is unclear whether it refers to evidence only recently viewed by the defendant, as Aguilar suggests, or instead to evidence plea counsel could have discovered with reasonable diligence, as the People maintain. Where a statutory phrase is susceptible to two or more reasonable interpretations, we may resort to legislative history to ascertain legislative intent. (*Carmack v. Reynolds* (2017) 2 Cal.5th 844, 850.) We aim to harmonize statutory terms within the entire legislative scheme, looking to similar language in other statutes concerning the same subject matter. (*People v. Etheridge* (2015) 241 Cal.App.4th 800, 806.)

Section 1473.7 expanded prior law, which provided narrow grounds to vacate a conviction for newly discovered evidence of government fraud or misconduct. (Legis. Counsel's Dig., Assem. Bill No. 813 (2015−2016 Reg. Sess.), Stats. 2016, ch. 739; see § 1473.6, subd. (a).) That existing statute defined "newly discovered evidence" as

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8 We disregard Aguilar's insinuation that plea counsel "securely tucked" the erroneous battery of a school employee charge into the plea form to give him a chance of escaping deportation.

"evidence that could not have been discovered with reasonable diligence prior to judgment." (§ 1473.6, subd. (b).) Courts apply the same limitation to "newly discovered evidence" on habeas review. (§ 1473, subd. (b)(3)(B); see *In re Hardy* (2007) 41 Cal.4th 977, 1016.) A similar standard likewise applies on a new trial motion. (§ 1181, subd. (8) ["new evidence" is evidence the defendant "could not, with reasonable diligence, have discovered and produced at the trial"].)

Drawing from these definitions, "newly discovered evidence" under section 1473.7, subdivision (a)(2) means evidence Aguilar could not have discovered with reasonable diligence prior to entry of judgment. The procedural bar in section 1473.7 supports this interpretation: a motion to vacate based on newly discovered evidence of actual innocence "shall be filed without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief under this section." (§ 1473.7, subd. (c).)

Aguilar concedes the video could have been discovered before his plea with reasonable diligence. Plea counsel reviewed the video and "investigative reports" before advising him on the plea. Aguilar discussed the video with plea counsel before changing his plea. He could have, but did not, request to view it. On this record, the security video was not "newly discovered." (See *In re Hardy*, *supra*, 41 Cal.4th at p. 1016 [where evidence is reasonably available to a defendant had his counsel conducted a reasonably thorough pretrial investigation, it is unlikely to be " 'newly discovered' "].)

Relying on *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*), Aguilar argues his plea counsel's ineffectiveness renders the video newly discovered. The

argument seems to be that plea counsel mischaracterized the nature of the video, leading Aguilar to unwittingly accept the plea. Aguilar cites no authority for the proposition that a video actually known to the defendant becomes "newly discovered" if counsel did not make him view it. We reject that claim.

Indeed, even if such a theory were viable, relief based on the video is procedurally barred. Civil counsel advised Aguilar in January 2015 that the video demonstrated his actual innocence. He waited three years after that advisement to assert an actual innocence claim. (§ 1473.7, subd. (c) [motion must be filed without undue delay]; see *In re Reno* (2012) 55 Cal.4th 428, 462–463 [defendant's habeas claims were untimely, despite "stock justifications" that he " 'acted as diligently as possible' "].) Aguilar's contention that changes in the law in 2017 (the enactment of § 1473.7 and issuance of *Lee*, *supra*, __ U.S. __ [137 S.Ct. 1958]) overcome any procedural bar is unpersuasive. Nothing stopped him from seeking habeas relief while he remained in custody. (§ 1473, subd. (a).) Indeed, in late 2015 he sought habeas relief based on newly discovered evidence, but *limited* that claim to the out-of-state impeachment evidence concerning Cariann.[9]

2. *The security video does not show "actual innocence"*

Even if the video were "newly discovered," it does not show his "actual innocence." Here is what we see:

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9 Aguilar's December 2015 habeas petition is not in our record, but the court's longform order indicates he did not protest his actual innocence and relied solely on new "impeachment" evidence, not the videotape.

> Cariann and a female companion walk down a hall from the restrooms to the bar. When she slips on a wet floor, the woman and Aguilar assist her into a chair. The three chat briefly, with Aguilar bent over Cariann. Cariann pushes Aguilar's hand away, and he walks off.
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> Cariann's companion hands her what looks like a cell phone and steps away for a couple of minutes. Within seconds, Aguilar walks up to the seated Cariann, leans over her, and puts his hand up her skirt. At one point Cariann seems to fall forward unnaturally. After about thirty seconds, Cariann pushes Aguilar with some force, and he steps back. He approaches again, and Cariann pushes him away once more.
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> Aguilar then picks up Cariann's purse from the ground, hands it to her, and leans over her to rub his face against her neck. She puts her hand on his shoulder as he leans over, and Aguilar again puts his hand up her skirt. They appear to talk, with Aguilar still leaning over Cariann. At two points she lightly pushes Aguilar away. Aguilar again puts his hand up her skirt, and Cariann appears to acquiesce—her legs go apart, and she covers her face with her left hand. Her head suddenly falls back, with her hand still on her face, as Aguilar continues to touch her.
>
> Suddenly Aguilar turns around. Cariann's companion returns, gives Cariann what appears to be a glass, and then lightly pushes Aguilar away. Aguilar soon leaves.

Aguilar was charged with forcible sexual penetration and sexual penetration of an unconscious person. (§§ 289, subds. (a)(1)(A) & (e).) He admitted guilt to a lesser included offense of forcible sexual penetration. The video does not show actual innocence of the charged offenses, much less any conceivable lesser included offense.

Given our peculiar record, we are left to compare the new evidence to the charges, not to the conviction. The 2015 nunc pro tunc correction referenced the wrong statute. A defendant commits sexual battery within the meaning of section 243.4, subdivision (c) when he or she "touches an intimate part of another person for the purpose of sexual

arousal, sexual gratification, or sexual abuse, and the victim is at the time unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose." We question whether there is any basis for believing that Aguilar digitally penetrated Cariann under the false pretense of a professional purpose, or that based on such pretense, Cariann was unconscious "of the nature of the act." Instead, the acts depicted in the video would appear to support a conviction under section 243.4, subdivision (a), touching the intimate part of Cariann against her will while she was restrained for sexual gratification. Sexual battery under that statute is subject to the same sentencing scheme of two to four years. (§ 243.4, subd. (a).)

On our record, the fact that Aguilar appears to have been convicted under the wrong statute does not affect our analysis. It is an open question whether a court can consider challenges to the factual basis for the plea by direct appeal even with a certificate of probable cause. (See *People v. Palmer* (2013) 58 Cal.4th 110, 115.) We have not found, nor have the parties offered, any authority permitting us to revisit this issue after a defendant is released from custody and the court denies his motion to vacate. It is sufficient for our purposes that Aguilar admitted guilt to an LIO of count 1. The evidence he now proffers does not show actual innocence of even the greater charges, much less any possible lesser included sexual battery offense.[10]

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10 Aguilar argues at length that the video reveals Cariann was neither unconscious nor nonconsenting. For purposes of our review, it is sufficient that it does not prove his actual innocence of even the charged sexual penetration offense in count 1 (§ 289, subd. (a)(1)(A)). We disagree that the video "starkly illustrate[s] [Aguilar's] innocence of any sex offense."

Aguilar makes much of the fact that he received a four-year sentence and deportation when, in hindsight, the evidence suggests a chance of acquittal. He forgets he faced two counts of sexual penetration for a potential eight year term (§ 654, subd. (a)), followed by deportation. He stood to receive as little as two years in prison by accepting the plea.

More importantly, whatever uncertainty the video may trigger, Cariann maintained she had been sexually assaulted. The woman who was with her returned to see Aguilar's hand up Cariann's skirt; she pushed him away because "something didn't look right." Cariann's boyfriend recalled her being distraught and repeatedly saying something was not her fault. The video does not disprove Cariann's account. It instead shows Aguilar repeatedly putting his hand up an intoxicated woman's skirt even after she pushed him away. Because the video does not show Aguilar's actual innocence of any lesser included sexual battery, he is not entitled to vacate his conviction under section 1473.7, subdivision (a)(2).[11]

Aguilar's reliance on *Strickland* for a contrary result is again misplaced. As we understand it, Aguilar is attempting to meld the standard for prejudice for ineffective assistance claims ("reasonable probability" of a different outcome) onto his motion to vacate. He claims the video shows his actual innocence because a different outcome (not taking the plea) would have been reasonably probable but for plea counsel's advice.

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11 Aguilar submitted a declaration by an expert, who opined that Aguilar's plea counsel was ineffective. This opinion is irrelevant to whether the video constitutes evidence of Aguilar's actual innocence.

Simply put, the test is not whether a different outcome was reasonably probable but instead whether evidence of "actual innocence" requires us to vacate his conviction. (§ 1473.7, subd. (a)(2).)[12] On our review, the video is not such evidence.

Finally, finding no error on any asserted ground, we reject Aguilar's claim that the cumulative effect of such errors requires reversal.[13]

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12 Habeas claims based on new evidence now require a defendant to show the evidence "would have more likely than not changed the outcome at trial." (§ 1473, subd. (b)(3)(A).) Even this standard is more stringent than the "reasonable probability" standard for ineffective assistance claims on which Aguilar relies. (*Strickland*, *supra*, 466 U.S. at p. 693 ["we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case"].) Motions to vacate under section 1473.7 rest on an even higher standard, that of "actual innocence."

13 Aguilar requests judicial notice of: (1) a document indicating a September 2019 hearing date before the immigration court, and (2) the death certificate of the attorney who represented him in habeas proceedings. Because these matters are not relevant to our review, his request is denied. (*People v. Blount* (2009) 175 Cal.App.4th 992, 995, fn. 2.)

DISPOSITION

The order is affirmed.

DATO, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.